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Appellate Docket
No. 629

In the

Supreme Court of the United States

October Term, 1962

ALFRED J. HAUSFELD,
Petitioner,

vs.

ROBERT N. ZIEGLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

MELVIN EDWARD SCHAENGOLD
500-502 Keith Bldg.
Cincinnati 2, Ohio
Attorney for Petitioner

Court Index Press, Inc. — Law Printers — 809 Walnut Street, Cincinnati 2, Ohio.

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ALFRED J. HAUSFELD,

Petitioner,

vs.

ROBERT N. ZIEGLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Ohio, entered in the above entitled cause on October 3, 1962.

CITATIONS TO OPINIONS BELOW

There are no written opinions in this case by any of the Ohio Courts, the Supreme Court of Ohio, the Court of Appeals of the First Appellate District of Ohio, and the Court of Common Pleas of Hamilton County, Ohio, that heard and decided this case.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered of record in that Court on July 5, 1962; a timely application for rehearing was filed in the Supreme Court of Ohio, and rehearing was denied by the Supreme Court of Ohio on October 3, 1962, thereby making the judgment of the Supreme Court of Ohio final in this case. The jurisdiction of this Court is invoked under 28 USC 1257 (3) because this case involves a right, privilege and immunity under the Constitution of the United States of America.

FEDERAL QUESTION PRESENTED

Is a spouse denied Federal Due Process of Law by a state court's dismissal of his petition as being a sham and frivolous pleading in an action for damages for alienation of affections (in a state where actions for damages for alienation of affections can generally be brought) against the lawyer of the wife of said spouse in a divorce proceeding involving said spouse and his wife, wherein said spouse alleges that said lawyer willfully and maliciously advised the wife of said spouse not to effectuate a reconciliation with said spouse in order that said lawyer would be able to charge a larger attorney fee for representing the wife of said spouse in said divorce proceeding than said lawyer would have been able to charge had a reconciliation been effected between said spouse and his wife?

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article VI, paragraph 2 of the Constitution of the United States—

popularly called, "The Supremacy Clause," are involved in this case.

STATEMENT OF THE CASE

Petitioner sued the Respondent in the Court of Common Pleas of Hamilton County, Ohio, for damages for the alienation of the affections of Petitioner's wife by the Respondent; the Respondent is an attorney and counsellor at law practicing his profession in the City of Cincinnati, Ohio.

The respondent, acting both in Propria Persona and by counsel of his own choosing filed a Motion in the Common Pleas Court of Hamilton County, Ohio to strike the Petition of the Petitioner from the files of that Court on the grounds that said Petition was a sham pleading (the Petition of the Petitioner which the Court of Common Pleas of Hamilton County, Ohio, the trial Court, struck from the files as being a sham pleading is set forth in Appendix "A").

The Court of Common Pleas of Hamilton County, Ohio granted the Motion and the Petition of the Petitioner was ordered stricken from the files of that Court. Without opinion the Court of Appeals of The First Appellate District of Ohio and The Supreme Court of Ohio sustained the action of the Court of Common Pleas of Hamilton County, Ohio.

And, within the time provided by law, certiorari proceedings were instituted in this Court to reverse the judgment of the Supreme Court of Ohio and to give the Petitioner his day in Court, something which all of the Ohio Courts that have passed on this case have refused to do.

HOW FEDERAL QUESTION IS PRESENTED

Under Ohio practice, aside from the inherent power of any Court to strike any pleading from the files as being a sham and frivolous pleading, the striking of a Petition from the files as being sham and frivolous ends the case. And the party whose petition is stricken has no further recourse. And that raises a Federal Constitutional Question by the very nature of the proceedings themselves. It is well to note, and to emphasize at this point, that there is no magic formula, no talismanic phrase, or incantation that must be said, muttered, or mumbled to raise a Federal Constitutional Question. By filing a Motion to Strike the Petition of the Petitioner from the files of The Court of Common Pleas of Hamilton County, Ohio, the respondent, under Ohio practice, was admitting that everything that was alleged in said Petition was true, as a matter of fact, while at the same time denying legal liability as a matter of law. Respondent in effect was saying to the Court of Common Pleas of Hamilton County, Ohio: if you force me to go ahead and defend against this Petition, you will force me to defend against a charge on which there is no evidence in support thereof and you will thereby be depriving me of my Federal Constitutional rights; and sub silentio cited: *De Jonge* v. *Oregon*, 299 US 353, 362; *Cole* v. *Arkansas*, 333 US 196, 201; *Schware* v. *Board of Education*, 353 US 232; *U. S. ex rel Vautjean* v. *Commissioner*, 273 US 103, 106; *Moore* v. *Dempsey*, 261 US 86; *Yick Woo* v. *Hopkins*, 118 US 356, in support of his (respondent's position).

By opposing the Motion to Strike his Petition from the Files as being a sham and frivolous pleading the Petitioner, sub silentio, relied on *Jones* v. *Cunningham*, 297 Fed (2nd) 851, CCA-4th, thereby placing the Petitioner in this case in the same unseaworthy boat as the miserable wretch

whose petition for Habeas Corpus was summarily dismissed without a hearing on the merits, both actions being a deprivation of Federal Rights.

Every time a state court dismisses a case by Motion to Strike a pleading as being a sham pleading, both the 14th Amendment and the Supremacy Clause of the Federal Constitution are sitting on the bench with the State Judge who summarily dismisses such a case, and both have an equal if not more powerful voice in the decision. They must have, if the Supremacy Clause of the Federal Constitution means anything at all.

This case is unusual in that the Federal Question was initially raised by the Respondent in the Trial Court; but, once raised, it is a two edged sword that cuts both ways; and had the ruling of the trial court and of the other Ohio Courts been in favor of the Petitioner instead of the Respondent it is safe to assume that the Respondent would be making the same arguments that the Petitioner is making here.

And, *disregarding form and looking at substance*, no matter which way the Trial Court ruled on the Motion of the Respondent in that Court to strike the Petition of the Petitioner from the files, at bottom a Federal Question was raised and passed on: to deny Petitioner access to the Ohio Courts raised a Federal Constitutional question; and to force the respondent to defend against a charge on which he alleged there was no evidence, as a matter of law to sustain said charge, likewise raised a Federal Constitutional Question.

There is no question but that a Federal Constitutional question was raised; the only question before this Court is: did the Ohio Courts resolve that Federal Constitutional Question properly, and of course, the answer to that question is that the Ohio Courts were wrong, dead wrong.

REASONS FOR GRANTING THE WRIT

When one is in the unfortunate position of having to petition the Supreme Court of the United States for a Writ of Certiorari, one is in the position of the condemned having to appeal to Caesar; and when one has to appeal to Caesar one has nothing to lose: life has already been lost Therefore, one can speak freely.

By striking the Petition of the Petitioner (see Appendix "A" where the Petition is printed) from the files, the Supreme Court of Ohio legalized *a racket*.

That in itself is reason enough to grant this Petition for Certiorari; to reverse summarily the judgment of the Supreme Court of Ohio; and to remand this case back to the Supreme Court of Ohio with directions to order this case heard on the merits.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted as prayed for.

All of which is respectfully submitted by,

MELVIN EDWARD SCHAENGOLD
500-502 Keith Bldg.
Cincinnati 2, Ohio
Attorney for Petitioner

APPENDIX "A"

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A183100

ALFRED J. HAUSFELD, 6549 Baywood Lane, Cincinnati, Ohio,

Plaintiff,

vs.

ROBERT N. ZIEGLER, 2213-2216 Carew Tower, Cincinnati, Ohio, Or 7850 Indian Hill Road, Indian Hill, Cincinnati, Ohio,

Defendant.

PETITION

Now comes Alfred J. Hausfeld, plaintiff herein, and for his cause of action against the defendant herein, says as follows, to-wit:

At all times mentioned herein the defendant was, and still is, an Attorney and Counsellor at Law, duly licensed to practice his profession in all of the Courts of Record of the State of Ohio.

On or about November 28, 1936, the plaintiff herein married one Sylvia Hausfeld at Cincinnati, Ohio, and did live happily with her as man and wife up to and about June 19, 1957.

On or about June 19, 1957, marital discord arose between plaintiff and the said Sylvia Hausfeld; the said

Sylvia Hausfeld left plaintiff and went to defendant to obtain legal counsel for the purposes of obtaining a divorce from plaintiff.

To protect his rights in the premises plaintiff employed one Nicholas Bauer who was then and who still is an Attorney and Counsellor at Law duly licensed to practice his profession in all of the Courts of Record of the State of Ohio.

At all times mentioned herein the plaintiff was attempting to seek a reconciliation with the said Sylvia Hausfeld, who still had affection for plaintiff.

On September 24, 1957, the defendant willfully, maliciously and without any reasonable or probable cause for so doing and with the intent of preventing a reconciliation between plaintiff and his wife, so that defendant's attorney fee would be increased, advised the said Nicholas Bauer by letter dated September 24, 1957, that he, the defendant, had advised the said Sylvia Hausfeld to neither seek a divorce from the plaintiff nor to reconcile with the plaintiff, nor to permit plaintiff to return to the marital home unless plaintiff submitted to psychiatric treatment, there being no reason for plaintiff to submit to such treatment.

As the proximate result of the aforesaid malicious and willful acts of the defendant, the said Sylvia Hausfeld refused to allow plaintiff to return to the marital home; the attempt of plaintiff to seek a reconciliation with the said Sylvia Hausfeld was destroyed; the affection which the said Sylvia Hausfeld had previously had for plaintiff was alienated; and the said Sylvia Hausfeld did divorce plaintiff on May 21, 1959, thereby damaging plaintiff in the premises in the sum of Fifty Thousand ($50,000.00) Dollars actual damages, and in the sum of Fifty Thousand ($50,000.00) Dollars punitive damages making a total of One Hundred Thousand ($100,000.00) Dollars damages in all.

WHEREFORE, plaintiff prays for judgment against the defendant herein in the sum of One Hundred Thousand ($100,000.00) Dollars; for his costs herein expended; for the allowance of attorney's fees in a reasonable amount; for an Order of this Honorable Court commanding the defendant to answer, in writing and under oath, the Interrogatories attached hereto which are pertinent to the issues herein; and for all other relief, both general and equitable, to which the plaintiff may appear to be entitled.

All of which is respectfully submitted by,

MELVIN SCHAENGOLD,
500-502 Keith Building,
Cincinnati 2, Ohio
Attorney for Plaintiff.

STATE OF OHIO :
SS
HAMILTON COUNTY :

ALFRED J. HAUSFELD, having been first duly cautioned and sworn, deposes and says that he is the plaintiff herein, and that the facts stated and matters contained in the foregoing Petition are true as he verily believes. Further affiant saith not.

.....

Sworn to before me, signed and acknowledged in my presence this 13th day of June, 1961.

MELVIN SCHAENGOLD
Notary Public State of Ohio.
My commission expires August 21, 1962.

PRAECIPE

TO THE CLERK:

Please issue summons on the within Petition to the defendant named therein, returnable according to law. Endorse: "ACTION FOR DAMAGES FOR ALIENATION OF AFFECTIONS; AMOUNT CLAIMED $100,000.00, COSTS, ALLOWANCE OF ATTORNEY'S FEES AND OTHER RELIEF."

MELVIN SCHAENGOLD
Attorney for Plaintiff
500-502 Keith Bldg.
Cincinnati 2, Ohio.

INTERROGATORY

1. Did you write a letter, dated September 24, 1957, to Mr. Nicholas Bauer, Attorney at Law, Second National Bank Bldg., Cincinnati 2, Ohio, in which you said: "She has been advised not to permit him to return to the home unless and until both psychiatrists agree that he has improved sufficiently and has demonstrated an attitude of cooperation which would justify such a reconciliation."

(Duly Certified)

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ROBERT N. ZIEGLER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINION BELOW

A written opinion was rendered by the Court of Appeals for the First Appellate District of Ohio and that opinion is set forth herein as Appendix "A".

ADDITIONAL PARTS OF THE RECORD

Respondent submits herewith the following additional portions of the record in the Courts below in the belief

that they are pertinent and of assistance in a review of this matter:

Appendix "B" – Respondent's "Motion to Strike Petition from the Files," filed in Hamilton County Common Pleas Court.

Appendix "C" – "Entry Granting Motion to Strike Petition from Files and Dismissing Action" in Hamilton County Common Pleas Court.

Appendix "D" – "Judgment of Affirmance" in the Court of Appeals, First Appellate District of Ohio.

Appendix "E" – Order of the Supreme Court of Ohio Overruling Petitioner's Motion to Certify.

Appendix "F" – Order of the Supreme Court of Ohio Denying Petitioner's Petition for Rehearing.

JURISDICTION

Petitioner does not present a jurisdictional question for the consideration of the Supreme Court of the United States for the reason that the same was not seasonably raised in the proceedings before the Supreme Court of Ohio in accordance with Ohio law and was first presented to the Supreme Court of Ohio on Petitioner's Petition for Rehearing, after a hearing had been had on Petitioner's Motion to Certify, and a final order entered by the Supreme Court of Ohio overruling the Motion to Certify.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to consider a federal constitutional question

raised by the Petitioner for the first time in his Motion for Rehearing before the Supreme Court of Ohio, after hearing on Petitioner's Motion to Certify and Entry of a final order by the Supreme Court of Ohio?

2. Have any rights of the Petitioner, under the Constitution of the United States, been violated or denied where a petition filed by Petitioner in the State Court, seeking damages for alleged alienation of affection, is stricken from the files by the State Court, on motion of adverse party, asserting that the petition is a sham and vexatious pleading and states no cause of action against the defendant?

STATEMENT OF FACTS

Petitioner filed in the Common Pleas Court. Hamilton County, Ohio a petition against the Respondent for damages, alleging that Respondent had alienated the affections of the Petitioner's wife by advising her to neither sue for divorce nor reconcile with Petitioner until Petitioner had first submitted to psychiatric treatment. (Said petition in Common Pleas Court is attached to Petitioner's Petition for a Writ of Certiorari herein as Appendix "A" thereto.)

This Respondent filed in Common Pleas Court a "Motion to Strike Petition from the Files," which motion is set forth herein as Appendix "B". The basis of said motion are stated therein. Respondent contended that that petition was "a sham and vexatious pleading" which failed to state a cause of action, and was, therefore, subject to a Motion to Strike from the Files.

The Common Pleas Court, upon consideration of written memoranda and argument, found Respondent's motion well taken and granted same, and, inasmuch as Petitioner had indicated *his election not to plead further,*

the Court dismissed the action. The Court's entry is set forth herein as Appendix "C".

Petitioner took his appeal from that dismissal to the Court of Appeals for the First Appellate District of Ohio. That Court of Appeals found no error in the proceedings below and affirmed the judgment of the Court of Common Pleas. That judgment is set forth herein as Appendix "D" and the Opinion of that Court is set forth herein as Appendix "A".

Petitioner then filed in the Supreme Court of Ohio a Motion to Certify, and that Court, upon consideration of briefs and hearing of oral argument, overruled the motion. That order of the Ohio Supreme Court is set forth herein as Appendix "E".

Petitioner then filed in the Supreme Court of Ohio a Petition for Rehearing, which Petition that Court denied. That order of the Ohio Supreme Court is set forth herein as Appendix "F". It was in that Petition for Rehearing that the first mention was made by Petitioner of the existence of a federal constitutional question.

ARGUMENT

1. DOES THE SUPREME COURT OF THE UNITED STATES HAVE JURISDICTION TO CONSIDER A FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE PETITIONER FOR THE FIRST TIME IN HIS MOTION FOR REHEARING BEFORE THE SUPREME COURT OF OHIO?

Respondent submits that the Court does not have such jurisdiction. Under the Ohio law, constitutional questions which are not raised prior to hearing in the Supreme Court of Ohio are not considered seasonably raised and are deemed waived. *The Village of Clarington* v. *Althar,* 122

O.S. 608. Following the reasoning of that decision, the Petitioner should have raised the alleged federal constitutional question before the Court of Common Pleas. He did not object to the proceedings in the hearing on Respondent's motion nor did he at any time attack the validity of the Ohio law which permits a court to strike a pleading from the files.

Respondent submits that a federal constitutional question is not raised, as contended by Petitioner, merely by the existence of circumstances which counsel now asserts have, or might have, constitutional implications. It is not raised "sub silentio," as Petitioner contends, nor does it merely develop of its own volition. To "raise" or to "present" a constitutional question means just what the words imply — an active calling of the Court's attention to that question. It is clear that the first mention of the question occurred in Petitioner's Petition for Rehearing in the Ohio Supreme Court.

This Court has ruled many times on the question of whether the federal constitutional question was seasonably raised. *Brown* v. *Massachusetts*, 144 U.S. 573; *Hulbert* v. *Chicago*, 202 U.S. 275; *Edelman* v. *California*, 344 U.S. 357; *Bailey* v. *Anderson*, 326 U.S. 203.

With specific reference to a situation such as exists in the case at bar, this Court in the case of *Herndon* v. *Georgia*, 295 U.S. 441, stated:

> "3. An attempt to raise a federal question before a state Supreme Court upon a petition for rehearing after judgment is too late, unless that Court actually entertains the question and decides it."

2. HAVE ANY RIGHTS OF THE PETITIONER, UNDER THE CONSTITUTION OF THE UNITED STATES, BEEN VIOLATED OR DENIED WHERE A PETITION FILED BY PETITIONER IN THE STATE COURT, SEEKING DAMAGES FOR ALLEGED ALIENATION OF AFFECTION, IS STRICKEN FROM THE FILES BY THE STATE COURT, ON MOTION OF ADVERSE PARTY, ASSERTING THAT THE PETITION IS A SHAM AND VEXATIOUS PLEADING AND STATES NO CAUSE OF ACTION AGAINST THE DEFENDANT?

The question must be answered in the negative, for the following reasons:

(a) Ohio law provides for the procedure followed.

(b) Petitioner voluntarily elected not to plead further, thus resulting in dismissal of his action.

(c) Petitioner was afforded full hearing and review of the question.

(a) Ohio Revised Code, Sec. 2309.70, provides statutory authority for a motion to strike pleadings from the files. The propriety of such a pleading has long been recognized by the Ohio courts. In *Golay* v. *Zollinger*, 16 Abs. 387, the court states:

> "A trial court may, in its discretion, sustain a motion to strike from the files a pleading which is of such a character that there is not a semblance of a cause of action or defense stated therein, rather than relegate the movant to a similar remedy by demurrer."

In *Marting* v. *Graff*, 82 Abs. 202, affirmed by the Court of Appeals in 82 Abs. 212, the court states:

> "A petition which, stripped of conclusions of law, conclusions of the pleader and argumentative matter, contains no affirmative allegations of fact which might

> properly be directed to the relief sought therein, is a frivolous and vexatious pleading and on motion will be stricken from the files."

The Supreme Court of Ohio recognized the necessity of such a motion in *White* v. *Calhoun*, 82 O.S. 401:

> "1. The power of the court of common pleas to order stricken from the files an answer which is a sham answer, one which, although good in form, is false in fact and not pleaded in good faith, is a power existing at the common law, and is one of the powers inherent in the court to be exercised in due and speedy administration of justice."

That this well recognized procedure of striking a pleading from the files was properly invoked in the instant case is clear from a review of the pleading which was stricken. Applying the language of the court in the case of *Marting* v. *Graff, supra*, the petition, stripped of conclusions of law, conclusions of the pleader and argumentative matter, contains no affirmative allegations of fact which might properly be directed to the relief sought. Such was the ruling of the Court of Common Pleas.

(b) As indicated in the entry granting Respondent's motion (Appendix "C") the Petitioner elected to have the ruling on that motion have the effect of a final order. Petitioner might, on the other hand, have filed an amended petition in an attempt to state a cause of action and pursue the matter to determination on its merits. Therefore, if the ruling on Respondent's motion deprived Petitioner of a presentation of the evidence and determination of the merits, that deprivation resulted from his own election.

(c) As previously stated, Petitioner's contention regarding the subject pleading was considered by three courts in Ohio – the Court of Common Pleas, the Court of Appeals and the Supreme Court. In each instance the

Petitioner was afforded the opportunity of submitting written memorandum or brief and of oral argument. In each instance he availed himself of these opportunities.

CONCLUSION

Petitioner has deprived this Court of jurisdiction in this matter by failing to raise his alleged federal constitutional question in a timely fashion in the courts below.

Even if jurisdiction were to be taken, the history of the case, seen in the light of Ohio law, indicates that no rights of Petitioner under the Constitution of the United States have been violated or denied.

The argument of counsel for Petitioner implies — if, indeed, it does not categorically assert — that every plaintiff whose case has been dismissed upon motion striking his pleading for reasons good and sufficient under state law and procedure (and the same would have to be said of a demurrer or similar pleading) has been denied due process under the Federal Constitution. The mere statement of such a proposition is sufficient to demonstrate its fallacy and repugnance to sound and accepted jurisprudence.

Respectfully submitted,

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ROBERT N. ZIEGLER
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Cincinnati 2, Ohio

APPENDIX "A"

OPINION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

(March 26, 1962.)

Hamilton County, No. 9053

PER CURIAM.

An examination of the record discloses no error, prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

LONG, P. J., HILDEBRANT and KEEFE, J. J., concur.

APPENDIX "B"

MOTION TO STRIKE PETITION FROM THE FILES IN THE COMMON PLEAS COURT, HAMILTON COUNTY, OHIO

No. A-183100

Now comes the defendant in propria persona, and by his counsel, and moves the Court to strike the petition herein from the files, as a sham and vexatious pleading, for the following reasons:

1. That on the face of the petition, it is obvious that the petition does not state the semblance of a cause of

action, inasmuch as the allegations therein indicate no more than the fact that defendant, as an attorney, was complying with his duty in advising his client with reference to marital matters, and was suggesting medical counseling and services with respect to the marital relationship.

2. That the petition does not allege — nor under the circumstances pleaded could it be alleged — that any professional relationship existed between plaintiff and the defendant, which professional relationship is essential to the existence of a cause of action based upon improper advice given by an attorney.

3. That from the face of the petition, it was an improper act for the same to have been filed in this Court, the filing thereof by counsel for plaintiff being a violation of the Canons of Ethics of the legal profession, which Canons impose responsibility upon the attorney — as distinguished from his client — for the bringing of unjustifiable litigation, the effect of which is merely to harass or injure the opposite party or to work oppression or wrong.

ROBERT N. ZIEGLER (s)
Robert N. Ziegler,
In propria persona

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant

APPENDIX "C"

ENTRY GRANTING MOTION TO STRIKE PETITION FROM FILES AND DISMISSING ACTION IN HAMILTON COUNTY COMMON PLEAS COURT

No. A-183100

This cause came on to be heard on the Motion of the defendant, in propria persona, and by his counsel, to strike the Petition of the plaintiff in this cause from the files herein, the matter having been presented to the Court in argument by counsel for plaintiff and counsel for defendant; and the Court being advised in the premises and finding the Motion to be well taken, hereby orders that the same be and it is now granted, and the Petition of plaintiff in this cause is hereby ordered stricken and is stricken from the files herein.

Plaintiff not desiring to plead further in this cause, the same is hereby dismissed, and final judgment is hereby entered in favor of defendant, at plaintiff's cost.

An exception to the ruling of the Court is reserved to the plaintiff.

.....
Judge

MELVIN SCHAENGOLD (s)
Attorney for Plaintiff

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant

APPENDIX "D"

JUDGMENT OF AFFIRMANCE IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

No. 9053

This cause came on for hearing upon the appeal on questions of law, assignments of error, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the appellee recover from the appellant his costs herein expended taxed at $.....

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio for execution upon this judgment.

To all of which appellant, by his counsel, excepts.

.....

MELVIN SCHAENGOLD (s)
Melvin Schaengold
Attorney for Plaintiff-Appellant

ROBERT N. ZIEGLER (s)
Robert N. Ziegler
In Propria Persona

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant-Appellee

APPENDIX "E"

ORDER OF THE SUPREME COURT OF OHIO OVERRULING PETITIONER'S MOTION TO CERTIFY

(Thursday, July 5, 1962.)

No. 37524

It is ordered by the Court that this motion is overruled.

APPENDIX "F"

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITIONER'S PETITION FOR REHEARING

(Wednesday, October 3, 1962.)

No. 37524

It is ordered by the Court that rehearing in this case is denied.

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Under Ohio procedure, a Motion to Dismiss—regardless of when made—is the proper way of raising a constitutional question—state or federal. *Tumey* v. *Ohio*, 273 US 510. In the *Tumey* case the Motion to Dismiss was made at the end of the state's case and the circumstances of the case—repeat—the circumstances of the case raised the federal question. A federal question is raised in one way and in one way only—the circumstances of the case raise the question. *Tumey* v. *Ohio*, 273 US 510 If that were not so—the omission of some caballistic phrase—of some magical word—of some failure to bow three times to the

East and then to kow-tow—would be fatal to the raising of the constitutional question. Cases raise their own questions; they always have and they always will and that has been so well established and it is so well established that "the memory of man runneth not to the contrary."

For practical purposes a Motion to Strike a Petition from the files is the same as a Motion to Dismiss made at the conclusion of a plaintiff's case. Once the Motion to Strike the Petition from the files, or a Motion to Dismiss made at the conclusion of a plaintiff's case is granted, the case is over. And the election of the party against the motion was made and granted to stand on his case and to seek further relief by appellate review is not a failure to exhaust state remedies.

Ohio recognizes the right to bring an Action for Damages for Alienation of Affections. Such an action in Ohio is an action in damages for the commission of a malicious tort. 28 OJ (2nd) sec. 146 at page 271: *Flandermeyer* v. *Cooper*, 85 OS 327.

The judgment in the present case exempts lawyers in Ohio from legal liability for damages for alienation of affections in Ohio divorce cases. No other class of persons in Ohio is so exempt from legal liability in actions for damages for alienation of affections. Unless the Supreme Court of Ohio follows the minority view of *Cohen* v. *Hurley*, 366 US 117, there is no federal constitutional reason in favor of such an exemption for the legal profession. If anything the present authorities are the other way.

Furthermore, in the absence of any opinions, there is no way of knowing whether or not the judgment below rested on an adequate non-federal ground or any ground at all, for that matter. That being so, this Court can examine the record and determine the federal question itself. *Ivanhoe Irrigation District* v. *McCracken*, 357 US 275.

And considering the multitude of divorce suits that are filed in this country, and filed every day, this carte blanche amnesty given by the Supreme Court of Ohio to Ohio lawyers in Ohio divorce cases makes one wonder whether the command of the 14th Amendment—"No state shall deprive any person of * * * property * * * without due process of law" (there is a property right in the affections of a spouse, otherwise there could be no action for damages for alienation of affections of any nature at all consistent with the 14th amendment) has any legal force and effect in Ohio.

The Motion to Dispense with printing the record should be granted; certiorari should be granted; and the case should be sent back to the Court of Common Pleas of Hamilton County, Ohio for trial on the merits.

All of which is respectfully submitted by,

MELVIN EDWARD SCHAENGOLD
Attorney for Petitioner.

In the

Supreme Court of the United States

Appellate Docket

October Term, 1962

No. 629

ALFRED J. HAUSFELD,

Petitioner,

vs.

ROBERT N. ZIEGLER,

Respondent.

PETITION FOR RE-HEARING

Petitioner asks this Court to rehear, reconsider, and set aside its judgment, heretofore made herein, denying certiorari in this case on February 18, 1963 — US — for the following reasons, to-wit:

This case is "certworthy" and here is why it is:

This decision is going to make the rounds of lawyers and the public and lawyers are going to get the erroneous idea they can give any kind of advice that they feel like giving in divorce cases and get away with it — no legal liability will attach itself to them at all.

And the public, once it has learned of this decision — and it will — will lose what little confidence it has left in the legal profession.

All that Petitioner asks is: give me my day in Court: let me be heard: let me present my case to a jury: and if I

lose on the merits, that is one thing but don't deny to me the opportunity to proving my case.

All of the statements in all of the cases that a denial of certiorari merely means that four members of this Court don't feel that the case should be heard by this Court and expresses no opinion as to the merits of the case itself make a legal fairy tale. Even this Court, when the chips are down, doesn't subscribe to that view. Before any Justice of this Court feels that this is a contumacious statement let him look at the decision of this Court in *Chessman* v. *California*, 348 US 864. In *Chessman* v. *California*, 348 US 864, this Court denied certiorari without prejudice to the filing of a Writ of Habeas Corpus in an appropriate United States District Court. If this Court itself believed that a denial of certiorari meant nothing as a matter of law, so far as the merits of the case are concerned, there would have been no legal reason — and this Court certainly does not act without a legal reason to justify its actions — for this Court to go out of its way to state and to state specifically that a denial of certiorari is not an expression on the merits of the case and is not a bar to any other action. Only the awareness that this Court has for universal opinion of the Bench and the Bar as a whole that a denial of certiorari by this Court is an opinion on the merits would cause this Court to decide *Chessman* v. *California*, 348 US 864, as it did.

But Chessman is, or was, in a better position, legally speaking, than this Petitioner. Not only was his certiorari denied without prejudice, but this Court pointed the way for further relief by inviting the lower Courts not to construe the denial of certiorari as being a bar to any further collateral action taken by Chessman. *Chessman* v. *California*, 348 US 864. But this Petitioner cannot take further action once certiorari is denied. He certainly cannot file a Writ of Habeas Corpus and, so far as he is concerned,

his case was dismissed and he never had a chance to present his case to a trial court on the merits.

Carrying this a step further, once Chessman filed his Petition for a Writ of Habeas Corpus, as this Court invited him to do, *Chessman* v. *California*, 348 US 864, the District Court and the Circuit Court of Appeals dismissed the Petition without a hearing, the same as was done in this case; and this Court, holding that none of the allegations in Chessman's petition being controverted on the record before it, reversed the District Court, 128 Fed. Supp. 600, and the Circuit Court, 221 Fed. (2d) 276, and ordered the case back to the District Court for trial on the merits. *Chessman* v. *Teets*, 350 US 3. Now, it is very possible and it has happened, for this Court to deny direct relief on certiorari and then to grant the identical relief sought for on Habeas Corpus and to take both actions in the same case on the same record. *Leyra* v. *Denno*, 347 US 556. Hence the finality — for practical purposes — of an unqualified denial of certiorari becomes apparent here. Denial of certiorari decides this case on the merits.

But, thanks to the action of this Court in this case, this Petitioner is not as fortunate as either Chessman or Leyra; in fact, this Court is not giving to him the same Constitutional rights that were given to Chessman and to Leyra. Chessman eventually received his hearing and lost the case by dying in the gas chamber; Leyra was denied certiorari and won the case by having this Court — on the same record on which it denied certiorari — grant a writ of Habeas Corpus; and eventually the New York Courts freed him. So Chessman died and Leyra lived — *but both had one* advantage that is denied to this Petitioner — both had their day in Court and both had the chance to be heard on the merits of their respective cases. But this Petitioner is denied that right. All are heard but him.

By denying certiorari in this case, this Court is reversing *Chessman* v. *California*, 348 US 864; *Chessman* v. *Teets*, 350 US 3, and *Leyra* v. *Denno*, 347 US 556.

All that Petitioner asks this Court to do is to adhere to its previous rulings in *Chessman* v. *California*, 348 US 864; *Chessman* v. *Teets*, 350 US 3 and the rationale underlying the decision in *Lyria* v. *Denno*, 347 US 556, and order this case heard on the merits. There is nothing before the Court to controvert the allegations set forth in Petitioner's Petition, see Appendix "A", Petition for a Writ of Certiorari heretofore filed by the Petitioner herein. *Chessman* v. *Teets*, 350 US 3.

And lest there be any doubt that the constitutional question was properly raised in the trial Court — and that is basic to a grant of certiorari by this Court — this Court is referred not only to *Tumey* v. *Ohio*, 273 US 510, but also to *Karam* v. *McElroy*, 116 OA 288, reported in Ohio Bar for February 4, 1963, Vol. XXXVI, #5 (The Ohio Bar is published by the Ohio State Bar Association and contains the advance sheets of Ohio Appellate Decisions before said decisions reach the bound volumes). In *Karam* v. *McElroy*, 116 OA 288, Ohio Bar for February 4, 1963, Vol. XXXVI, No. 5, the right of an Ohio litigant to stand on the validity of a pleading and to seek relief from an erroneous ruling by appeal — as has been done in this case — has been re-emphasized as being an integral part of Ohio law, both substantive and procedural.

In the *Chessman* case, Chessman claimed that he was "robbed" — fraud had been practiced upon him. And since there were no allegations to controvert the claim in the record before this Court, this Court not only went out of its way to eradicate the popular belief that denial of certiorari is an expression of an opinion on the merits of the case but also ordered that the claim of fraud be

heard on the merits. *Chessman* v. *California*, 348 US 864, *Chessman* v. *Teets*, 350 US 3.

And, in the present case, the petitioner claims that he also was "robbed". To make a fee a lawyer *maliciously* told Petitioner's wife not to reconcile with him. And there is nothing in the record before this Court to controvert Petitioner's allegations. Yet, in the one case, *Chessman*, relief was granted, and in this case relief denied and denied finally. Why the distinction between this case and *Chessman* v. *Teets*, 350 US 3?

The order denying certiorari should be vacated; certiorari should be granted; and this case should be sent back to the Ohio Courts for trial on the merits.

All of which is respectfully submitted by.

MELVIN EDWARD SCHAENGOLD
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I, Melvin Edward Schaengold, Attorney for the Petitioner herein, certify that the foregoing Petition for Rehearing is filed by me in good faith; that it is restricted to the grounds stated and contained therein; and that it is not filed for the purposes of delay.

MELVIN EDWARD SCHAENGOLD